



Business Roundtable

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November 4, 2005

Andrew Heimert, Esquire
Executive Director
Antitrust Modernization Commission
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Henry A. McKinnell, Jr.
Pfizer Inc
Chairman

Dear Mr. Heimert:

On behalf of The Business Roundtable, I am providing a copy of our comments on certain issues being studied by the Antitrust Modernization Commission. I enclose both a printed copy and an electronic copy on a disk.

Kenneth I. Chenault
American Express
Company
Co-Chairman

If you have any questions, you can contact me, or our antitrust counsel Janet McDavid at Hogan & Hartson LLP. Contact information is set forth below.

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Thank you for your consideration.

Sincerely,

**Comments of the Business Roundtable
Regarding the Issues Selected for Study by the
Antitrust Modernization Commission**

November 4, 2005

On behalf of the Business Roundtable (the “Roundtable”), we are writing to provide comments on issues being studied by the Antitrust Modernization Commission (“AMC” or “Commission”). The Roundtable is an association of chief executive officers of leading U.S. corporations with a combined workforce of more than 10 million employees in the United States. The Roundtable has a single objective: to promote policies that will lead to sustainable, non-inflationary, long-term growth in the U.S. economy. It is only through such growth that American companies will be able to remain competitive around the world and thus provide the technology and jobs that will continue to improve our standard of living and extend the benefits of that standard of living to all Americans. To promote growth, competitiveness, and exports, the United States must create the right environment for American companies at home and abroad.

The Roundtable places particular importance on antitrust issues because of the impact these issues have on Roundtable members. The Roundtable recognizes that in some instances, the antitrust laws need to be revisited and revised to take into account such issues as: (1) economic globalization, (2) technological advances that create new products and services, and new ways of doing business, (3) the evolution of our economic understanding of antitrust issues, and (4) an increase in overlaps among enforcement institutions. In September 2004, the Roundtable submitted comments to the AMC recommending issues for study, and today provides specific recommendations with respect to certain issues selected by the AMC. These comments provide our recommendations on the topics of Antitrust Remedies, Mergers, the

Robinson-Patman Act, Enforcement Institutions, Exclusionary Conduct, International Issues, and Regulated Industries.

I. Remedies

A. Treble Damages

Treble damages in antitrust suits originated under Section 7 of the Sherman Act¹ and were later expanded to all private antitrust suits under Section 4 of the Clayton Act.² According to an article by Professor Edward Cavanagh, the legislative history of the Sherman Act suggests that treble damages were “primarily compensatory, but . . . were provided in part for punitive purposes.”³ Common rationales offered for treble damages are deterrence, compensation, and encouraging private antitrust enforcement. These rationales remain persuasive for per se cases, but none justify mandatory trebling of damages for all antitrust suits, including rule of reason cases.

The award of treble damages in all private antitrust suits imposes an undue burden and cost on businesses because it punishes all violations of the antitrust laws equally, regardless of the intent and severity of the effects of the conduct. Mandatory trebling can result in disproportionate liability, particularly in the absence of claims reduction and contribution. It could force a business into bankruptcy, thereby reducing competition. The mere threat of treble

¹ See Edward Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tulane L. Rev. 777, 778-79 & n.2 (1987) (quoting Section 7 of the Sherman Act: “Any person who shall be injured in his business or property . . . by reason of anything forbidden . . . by this act, may sue therefore . . ., without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.”). Section 7 was repealed in 1955. Act of July 7, 1955, ch. 283, Pub. L. No. 137, 69 Stat. 282 (1955).

² Cavanagh, 61 Tulane L. Rev. at 779.

³ *Id.* at 782.

damages can discourage competitive conduct that might be found lawful under a rule of reason analysis.

Naked restraints of trade are deemed illegal *per se* because they almost always lead to anticompetitive effects and have no procompetitive justification. In order to deter these forms of *per se* illegal conduct – horizontal price fixing, market allocation, and bid rigging – courts should continue to award treble damages for these violations. On the other hand, conduct analyzed under the rule of reason may have legitimate procompetitive justifications. If the rationale for mandatory trebling is deterrence, then trebling damages in rule of reason cases is unjustified. Trebling for all antitrust cases can lead to over-deterrence because trebling discourages businesses from engaging in legitimate and beneficial competitive conduct.

Proponents of treble damages justify them as fair compensation and as an incentive for plaintiffs to bring private actions. It is unclear whether Congress actually intended for private suits to act as an equal arm of enforcement of the antitrust laws. The legislative history suggests that Senator Sherman envisioned private suits as a little-used tool.⁴ If so, then Congress surely did not enact treble damages in order to incentivize private plaintiffs, and could not have foreseen the inefficiencies and unfairness sometimes caused by mandatory treble damages for conduct for which efficiency rationales exist. In today's system, treble damages encourage plaintiffs to bring baseless lawsuits and defendants to settle out of court to avoid the risk of crippling three-fold damage awards.

The Commission should urge Congress to amend the Clayton Act with regard to treble damages. The law should apply mandatory treble damages only to naked restraints that

⁴ *Id.* at 783.

are per se illegal. Actual damages should be available for conduct found illegal under a rule of reason analysis.

B. Attorneys' Fees

The Roundtable is focused on working to curb litigation abuses that cost our economy over \$246 billion a year and reward plaintiffs' attorneys far more than individual consumers. As with the recently passed Class Action Fairness Act ("CAFA"), it is important for Congress to ensure that the parties actually harmed by violations of the antitrust laws are rewarded. All too often, plaintiffs' attorneys receive a disproportionate share of the total settlement or recovery.

Under Section 4 of the Clayton Act, successful antitrust plaintiffs recover attorneys' fees and costs, even if only nominal damages are recovered (e.g. coupon settlements). Although the statute includes the term "reasonable" attorneys' fees, in practice fees are typically very high, contingent fees are common, multipliers are used, and when antitrust cases are settled, there sometimes is limited review of the reasonableness of attorneys' fees. The Roundtable urges the Commission to recommend that Congress articulate a meaningful standard of reasonableness with respect to the award of attorneys' fees in all antitrust cases. Similar to the CAFA provision, attorneys' fees should be reasonably calculated based on the actual amount of time spent litigating the case and should not be decided arbitrarily by counsel or contingent fee arrangements.⁵ All attorneys' fees should be required to be approved by the court under a

⁵ CAFA regulates attorneys' fees calculated as a percentage of the total settlement and requires court approval of fees. The law recommends best practices that courts can use to ensure that class members are true beneficiaries of settlements: "[T]he fees and expenses awarded to counsel in connection with a class action settlement [should] appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and the class members on whose behalf the settlement is proposed [should be] the primary beneficiaries of the settlement . . ." Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4.

meaningful standard of reasonableness and should appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries suffered by the plaintiff. Plaintiffs should be the primary beneficiaries of a damage award or settlement rather than their lawyers.

Additionally, in order to discourage waste, the AMC should urge that Congress allow the recovery of attorneys' fees by defendants where a plaintiff's claim is unreasonable, frivolous, without foundation, or in bad faith. This provision was part of the proposed Antitrust Remedies Improvement Act of 1986, but was not enacted at that time. That failure should be remedied now. Wasteful antitrust lawsuits and frivolous antitrust claims are a problem in need of an immediate solution.

C. Joint and Several Liability, Claims Reduction and Contribution

The Supreme Court's decision in *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981), explicitly denied an antitrust defendant the right to seek contribution from co-defendants. The holding in *Texas Industries* is clearly out of step with U.S. tort law, which allows contribution. The antitrust laws of this country largely draw on principles of tort. Therefore, the failure to allow contribution is inconsistent with the movement in tort law that has recognized the unfairness of joint and several liability without contribution.⁶

In *Texas Industries*, the Court's opinion recognized the unfairness that could result from a system of joint and several liability without contribution or claims reduction, but

⁶ W. Page Keeton, Prosser & Keeton on Torts § 50, at 336-37 (5th ed. 1984) ("There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or the plaintiff's collusion with the other wrongdoer, while the latter goes scot free.").

left the problem for Congress to solve.⁷ Unfortunately, Congress has not solved the problem, and today antitrust defendants frequently cannot afford to litigate a case to judgment because a successful plaintiff can recover the entire amount of trebled damages from any targeted defendant. Antitrust defendants face the potential for serious abuse and unfairness because, for example, each defendant in a price-fixing case is potentially liable for three times the damages attributable to the sales of all co-conspirators, regardless of size or culpability. As defendants settle, the pressure increases for the remaining defendants to settle, and a plaintiff's leverage is increased. The pressure exerted on defendants that choose to litigate a claim rather than settling early is known as the "whipsaw effect."

The Roundtable urges the Commission to recommend legislation to eliminate joint and several liability and allow contribution and claims reduction. Eliminating joint and several liability eradicates the unfairness caused by the whipsaw effect without depriving plaintiffs of the right to collect treble damages. With claims reduction, when a defendant chooses to settle, the amount of damages attributable to that defendant are deducted from the total amount of damages and remaining defendants are only liable for the balance of damages. Contribution gives defendants a right to bring an action against third-parties for their proportionate share of damages. These provisions do not harm plaintiffs, who can collect treble damages for the full amount of their harm, but require plaintiffs to seek damages from each responsible defendant in proportion to each defendant's actual share of the harm.

The Roundtable has advocated for contribution, claims reduction, and elimination of joint and several liability since the 1980s. In 1986, The Roundtable testified in support of S.

⁷ *Texas Industries*, 451 U.S. at 646 ("In declining to provide a right to contribution, we neither reject the validity of those arguments [in favor of contribution] nor adopt the views of those opposing contribution. Rather, we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.").

1300,⁸ a bill intended to eliminate joint and several liability in antitrust suits and alleviate disproportionate settlement pressure on litigating defendants. S. 1300 would have eliminated the unfairness in the current system by eliminating joint and several liability. Congress considered these issues in 1986, but failed to enact legislation because of disputes over retroactivity.

The AMC now has the opportunity to recommend legislation to improve the system of antitrust remedies without the distraction of issues such as retroactivity. The Roundtable stands by its prior position and makes the following suggestions for new legislation:

- Joint and several liability in antitrust suits should be eliminated;
- Damages awarded under the Clayton Act should be reduced according to the amount attributable to the harm caused by defendants that have settled with the claimant and been released from liability;
- Claims based on price-fixing agreements among competitors and damages as a result of overcharges or underpayments should be allocated on the basis of each competitor's proportionate share of the total of all competitors' overcharges or underpayments; and
- All claims and damages should be allocated based on relative responsibility for the violation for which damages are being awarded.

D. Indirect Purchaser Actions

Under the U.S. Supreme Court's decisions in *Hanover Shoe v. United Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), indirect purchasers generally cannot recover antitrust damages in federal courts and defendants cannot defend on the ground that the plaintiff "passed-on" the overcharge. In both cases, the Court sought to protect the incentive for direct purchasers to pursue antitrust cases and reduce the complexity that would otherwise arise from tracing overcharges through the distribution chain. The Court was concerned that, in the absence of these rules, both indirect and direct purchasers

⁸ S. 1300 was reported out of the Senate Judiciary Committee without the joint and several liability provision, but the bill eventually died on the Senate floor.

(who paid the largest overcharge) would have less incentive to bring suit because of doubt cast on the recoveries available to each class of purchaser.⁹

Although the *Illinois Brick* Court was concerned that allowing both direct and indirect purchaser actions without a pass-on defense would lead to multiple liability for defendants,¹⁰ in *California v. ARC America*, 490 U.S. 93 (1988), the Court confirmed the right of states to enact laws authorizing indirect purchaser actions. Now, because at least 30 states have statutes allowing indirect purchasers to bring antitrust claims in state courts under state antitrust laws, the Court's concerns about the effect of allowing both indirect and direct purchaser suits have been realized.

The result has been disastrous.

- First, there is risk of multiple liability because direct purchasers can recover the entire overcharge (trebled) under federal law, even if they passed on the overcharge to indirect purchasers. At the same time, multiple layers of indirect purchasers who paid an overcharge can recover for the overcharge (trebled) via state antitrust law.
- Second, multiple lawsuits in state and federal courts that cannot be coordinated not only generate a risk of multiple liability, but also present the potential for inconsistent judgments and pose a substantial burden on judicial resources.
- Third, courts continue to struggle with evidence of pass-on, thereby confirming the problem anticipated by the Court in *Illinois Brick* and *Hanover Shoe*.
- Fourth, state indirect purchaser cases have ultimately benefited plaintiffs' lawyers more than indirect purchasers because few customers actually retain the necessary records needed to establish their actual damages.

The present system is inefficient and unfairly burdens both defendants and the court system.¹¹

⁹ See, e.g., Section of Antitrust Law of the American Bar Association, *Report of the Indirect Purchaser Task Force*, 59 Antitrust L. J. 273 (1995); Section of Antitrust Law of the American Bar Association, *Report of the Illinois Brick Task Force*, 52 Antitrust L.J. 841 (1984).

¹⁰ In *Illinois Brick*, the Court recognized that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants." 431 U.S. at 730.

¹¹ The ABA Antitrust Section described the persistent problem in the area of indirect purchaser suits:

The abundance of litigation under state indirect purchaser statutes is creating the problems the Supreme Court foresaw in *Illinois Brick*. Duplicative lawsuits burden the parties, the courts, and eventually consumers. Defendants are often forced to settle claims to avoid multiple lawsuits and to save the time and money that goes into litigating even frivolous claims. Frequently these costs are passed on to consumers in the form of higher prices. In order to alleviate the burden of separate direct and indirect purchaser litigation in multiple jurisdictions, the Commission should recommend that Congress retain *Illinois Brick* and *Hanover Shoe* and preempt inconsistent state laws.

The Roundtable believes that preemption is the best solution to these problems, but recognizes the tremendous opposition to legislation that would preempt state indirect purchaser statutes without any alternative recourse for indirect purchasers. Therefore, the Roundtable is willing to consider a compromise similar to that set forth in the ABA Antitrust Section's Report on Remedies (August 2004). Specifically, the Roundtable could support Congress' creation of a federal cause of action for indirect purchasers to legislatively overturn *Hanover Shoe* and *Illinois Brick*. Such legislation would eliminate duplicative recoveries and liabilities by requiring direct and indirect plaintiffs to prove their respective damages, and resolve the inefficiencies of litigation in multiple forums by requiring consolidation of state and federal actions.

In 1993, the Report of Indirect Purchaser Task Force of the Antitrust Section pointed out that the result of the Supreme Court's *Illinois Brick* (denying indirect purchasers the right to sue under federal antitrust law in the interest of judicial economy) and *ARC America* (permitting states to authorize indirect purchaser lawsuits under state law) decisions was to permit inconsistent and potentially duplicative recoveries, and to encourage the inefficient use of judicial resources. We endorse this assessment, and note that the situation has not measurably improved in the last eight years.

ABA Section of Antitrust Law, *Task Force Report: The State of Federal Antitrust Law*, at http://www.aba.net/antitrust/pdf_docs/antitrustenforcement.pdf (2001).

On the other hand, the Antitrust Section proposal also includes pre-judgment interest and does not provide for preemption of state repealer statutes. Pre-judgment interest is unnecessary in light of treble damages. It could be especially unfair for defendants in antitrust actions because they are more protracted than other causes of action. The Roundtable cannot support the ABA proposal's explicit refusal to preempt state indirect purchase suits. The Roundtable believes that a satisfactory compromise would be one in which indirect purchasers were permitted to seek a remedy through the federal courts and that state indirect purchaser laws were preempted.

II. Mergers

A. Premerger Review Burdens U.S. Business and Stifles Growth

Merger reviews impose a significant burden on private parties primarily because of the time delay, filing fees, legal fees, other costs, and the distraction to management associated with a merger investigation. In merger transactions, time is a critical element because each day the parties are required to wait for approval reduces the business benefits of the transaction and increases the risk that the deal will not proceed. In addition to time, legal fees and merger filing fees impose substantial costs on the merging parties – private parties rank these as the largest external costs associated with M&A transactions.¹²

The HSR Act was originally intended to give the Antitrust Division and FTC the authority to review the 150 largest transactions that occur each year.¹³ Congress intended that HSR reviews would not be unduly burdensome for the merging parties. Although the Act was

¹² PriceWaterhouseCoopers, *A tax on mergers? Surveying the time and cost to business of multijurisdictional merger reviews* (June 2003) (study commissioned by the American Bar Association and International Bar Association).

¹³ H.R. Rep. No. 94-1373 at 11 (1976).

amended in 2000 to reduce the number of transactions for which filings are required, the burden on businesses persists.

The 2000 amendments to the HSR Act were a good start – the amendments reduced the burden on businesses by raising the filing thresholds to eliminate filings for smaller transactions and annually adjusting the filing thresholds in order to account for inflation. In most instances, the merger review process goes smoothly and does not impose unnecessary burdens on the parties. But in some cases further reforms are needed to reduce the burden of Second Requests. The issuance of a Second Request dramatically increases the cost, delay, and burden for both the agencies and the parties. Although the agencies have regularly professed their commitment to streamlining the process and reducing the burden of merger investigations, little meaningful reform has been achieved in the area of Second Requests.

B. Problems With the Second Request Process

Originally, Congress intended for Second Requests to be limited to data and information that was “reasonable” and “readily available to the merging parties.” This information was intended to assist the agency in its decision whether or not to litigate to enjoin a merger. Today, Second Requests go well beyond this intended purpose – staff uses this tool to engage in extensive fact finding and data gathering. As a result, Second Requests are overbroad and require parties to produce an extraordinary amount of documents and data, far beyond the scope of information that is “readily available.” Therefore, in spite of the fact that Second Requests are issued for a small percentage of transactions,¹⁴ the present system’s problems and the potential for greater issues in the future demonstrate the need for immediate reform.

¹⁴ Second Requests were issued for 2.5% of all transactions filed in FY04. *See* HSR FY04 Annual Report 4-5 & Figure 2.

In addition to straying from their original intended purpose, Second Requests can substantially delay the closing of a transaction and impose significant financial burden on the parties. Second Requests typically last six months and cost the merging parties \$5 million to comply.¹⁵ One report estimates that “more complex cases can require an additional year and cost applicants up to \$20 million.”¹⁶

The broad sweeping nature of the Model Second Request inevitably results in requests for information that are irrelevant to the particular industry or transaction under review. The agencies’ failure to tailor the Second Request to the particular transaction, and to provide the parties with insight into the competitive theory being pursued, obstructs the parties’ ability to propose appropriate modifications. Businesses have also raised cost concerns based on requests to translate foreign documents and to produce financial and econometric data that are not maintained in the ordinary course of business. These types of requests are inconsistent with Congress’ explicit intent only to require parties to produce information that is readily available to them. Instead, parties today face immense pressure to hire economic experts to manipulate raw data into the form desired by the agency, and language experts to translate volumes of documents from their foreign offices.

In the future, absent substantial reforms, the agencies are likely to drown in volumes of data and documents that the parties to a transaction will be capable of producing in a short period of time. As noted in a recent article, technology and the quantity of information that is retained electronically make it typical for parties to produce three times the amount of data they were producing just a few years ago.¹⁷ Not only must parties produce more data, but they

¹⁵ Cecile Kohrs Lindell, *Majoras Hopes to Streamline Reviews*, *TheDeal* (May 10, 2005), <http://www.thedeal.com>.

¹⁶ *Id.*

¹⁷ Joe Sims, *Trustbuster, Heal Thyself*, *American Lawyer* 59 (Aug. 2005).

can do so more rapidly, which leaves less time for the agencies to review submissions and make their decisions. The advent of new technology for searching and producing responsive documents will reduce the incentives for parties to negotiate terms of Second Requests.

C. Proposals for Changing the Second Request Process

The Roundtable recommends that the Commission urge the agencies to establish guidelines to improve the current system – and if the agencies fail to do so, that Congress legislate reforms. In general, a Second Request should be limited to information and documents that are not unreasonably cumulative or duplicative, and material that does not impose a burden or expense that substantially outweighs the likely benefit of the information to the agencies. The specific issues that require immediate attention include the following:

- A request for additional information or documentary materials should be capped to limit the number of custodians' files to be searched. If a particular transaction warrants a more widespread search, that expansion should require express authority from the Assistant Attorney General or Chairman of the FTC. Such requests should be rare.
- A Second Request should be limited to no more than 20 Specifications, including subparts, absent express authorization by the Assistant Attorney General or the Chairman of the FTC. All subparts to each specification must directly relate to the theme of the Specification so subparts can not be used to subvert the 20 Specification cap.
- A request for information or documentary materials should not impose a burden or expense that substantially outweighs the likely benefit of the information to the Antitrust Division or FTC in conducting preliminary antitrust review of a proposed acquisition.
 - Requests for econometric data not kept in the ordinary course of business should not be standard. Rather, requests for data that require the parties to manipulate existing data using sophisticated and costly experts and technology should be vetted and approved by agency management.
 - For transactions in which the parties' management maintains principal documents in English, the agencies should limit the number of foreign

documents they require to be translated to only those within the custody of key corporate decision makers for the company, and those relating to the business or product line most relevant to the competitive theory behind the investigation.

- A request should be annotated and should set forth in writing the specific competitive concerns presented by the proposed acquisition and the relation between those concerns and each specific request for additional information.
- Standards should be established to determine substantial compliance with a Second Request based on Congress' original intent that the parties produce only materials that are reasonable and readily available. A party should be deemed to have substantially complied unless the agency is materially impaired in its ability to conduct a preliminary antitrust review.
- The internal appeals process at both agencies has proved to be useless. A meaningful appeals process for disputes about Second Requests should be implemented. The Roundtable believes that initially disputes should be resolved through internal negotiations between the parties and the agency. But if negotiations fail, review by a federal district court judge would be the most effective way to resolve these issues.

The Roundtable urges the AMC to recommend meaningful reforms to the Second Request process.

D. Filing Fees Should Not Be the Primary Source of Agency Funding

The Roundtable strongly favors adequate funding for both the FTC and the Antitrust Division. Both agencies perform critical law enforcement missions. However, the Roundtable believes that HSR filing fees should not be used to fund the agencies because filing fees create an unstable funding level that rises and falls with the number of premerger filings and creates the risk of inadequate funding for the agencies. Dependence on filing fees also skews agency incentives. For example, the agencies know that creating additional HSR exemptions reduces agency funding so they have no incentive to do so. The agencies should be funded out of general appropriations, which is how other law enforcement activities are funded.

In addition, U.S. filing fees have set a bad example for the rest of the world. The U.S. premerger notification system – including filing fees – has become the model for other countries. At least 31 foreign competition authorities now impose filing fees.¹⁸ Foreign filing fees take on various forms: flat fees, fees per transaction, and scaled fees based on the size of transaction. Most countries use these fees to fund merger investigations.¹⁹ These fees create a significant burden on merging parties and ultimately hinder positive economic growth in the global economy. The Roundtable urges the AMC to recommend that the agencies be funded through general appropriations rather than filing fees.

III. The Robinson-Patman Act

A. The Robinson-Patman Act Is Not Consistent with Modern Antitrust Policy

It is widely accepted that the purpose of the antitrust laws is the protection of consumer interests. However, the Robinson-Patman Act (“R-P Act”) was explicitly enacted to protect small businesses from larger, more efficient competitors without regard to consumers. From the beginning, the R-P Act has been an anachronism because its very purpose is inconsistent with the promotion of consumer welfare through free and open competition.

“Price discrimination” is nothing more than setting different prices for different customers. Price discrimination can actually result in greater price competition and overall lower prices, both of which benefit consumers. But, under the R-P Act, price differences can be unlawful. Therefore, the R-P Act actually has the effect of discouraging businesses from engaging in price competition through lower prices. This is inconsistent with modern antitrust

¹⁸ *Merger Notification Filing Fees*, A Report of the International Competition Network 5 (Apr. 2005).

¹⁹ *Id.*

policy and harms consumers. The Commission should recommend the repeal or significant amendment of the R-P Act.

The Roundtable fully supports legislation that promotes small business, but the R-P Act does little to protect small businesses. Rather than risk being sued under the R-P Act, larger firms can simply refuse to sell to small businesses in order to maintain their relationships with larger customers. The result can be a lack of access to supply for small businesses. Rather than promoting consumer welfare, the R-P Act encourages price rigidity and oligopoly pricing, creates barriers to market entry, promotes inefficient production and distribution, and imposes undue regulatory burdens.

The R-P Act leads to price rigidity through inconsistent or uncertain application, and imposes a heavy burden on suppliers to justify legitimate price differences. Price rigidity occurs because a seller operating in multiple markets refrains from setting prices according to each market's conditions based on concerns about potential liability under the R-P Act. This reduces market efficiency because prices become wholly unresponsive to market conditions.

Price rigidity resulting from the R-P Act contributes to non-competitive pricing in oligopolistic markets even in the absence of concerted action by discouraging cheating through lower prices. In the absence of a price discrimination statute, large buyers would be able to negotiate lower prices from sellers, and sellers could use discounted pricing to pursue certain buyers. Price rigidity caused by the R-P Act discourages sellers and buyers from entering into individually tailored agreements for fear of liability.

The R-P Act results in barriers to new entry and creates markets that are more susceptible to anticompetitive conduct. The R-P Act inhibits new entry in two ways: it dissuades sellers from forming special pricing agreements and offering discounts to encourage

new buyer-entry and it inhibits sellers from offering lower prices in order to enter new markets. Low barriers to entry are critical to maintaining a competitive market because they ensure that existing market participants are always subject to competition from potential new entrants.

The R-P Act promotes inefficiencies in distribution schemes and product manufacturing. Defenses to the R-P Act, including the “functional discount” and “cost justification” defenses, are difficult to prove because of increasing complexities of today’s markets. A functional discount defense theoretically justifies price differences based on the cost of transporting goods from the seller to the retail outlet, but has become more difficult to prove given widespread dispersion of retailers and a growing distribution network. The cost justification defense is virtually impossible to prove. Because the R-P Act does not prohibit price differences between goods of different physical characteristics, including packaging differences, sellers can avoid R-P Act liability by manufacturing different forms of the same product. These wasteful practices, which are a direct result of efforts to avoid R-P Act liability, are not consistent with consumer welfare.

Finally, businesses fear R-P Act enforcement due to the tremendous uncertainties with the present law. These uncertainties impose substantial costs on businesses as they educate employees in R-P Act compliance and weigh implementing more efficient business practices against the threat of R-P Act litigation.

B. Recent Actions Under the Robinson-Patman Act

The R-P Act permits both private suits and government enforcement by the FTC or the Antitrust Division, yet the government has rarely litigated price discrimination cases under

the R-P Act in the last 20 years.²⁰ Furthermore, Section 3 of the R-P Act, which imposes criminal sanctions for unreasonably low pricing, has not been enforced for nearly 40 years. Almost 30 years ago in 1976, the Antitrust Division of the Justice Department recommended repeal of the R-P Act because “the Act has not shown itself to be capable of promoting the antitrust goals of continued competitive vigor.”²¹ Since then, the Antitrust Division has not filed any cases under the R-P Act and instead has chosen to regulate anticompetitive conduct through other antitrust laws. At the same time, the FTC has largely stepped back from R-P Act enforcement.²² In contrast, private R-P Act litigation has continued – thereby burdening the business community with litigation under a statute counter-productive to both consumer welfare

²⁰ Most recently, the FTC issued a complaint against McCormick’s spice company alleging primary line price discrimination against competing purchasers. *In re McCormick & Co., Inc.*, Complaint, Docket No. C-3939 (Apr. 27, 2000). Other Robinson-Patman Act claims in the past two decades included: a series of cases against book publishers including *In re Harper & Row Publishers, Inc.*, Complaint, Docket No. 9217 (Dec. 20, 1988) (alleging that a publisher violated the Robinson-Patman Act by offering discounts and promotions to national chain retailers, not otherwise offered to independent booksellers); and *In re Boise Cascade Corp.*, 113 F.T.C. 956 (1986) (upholding an ALJ finding that Boise Cascade knowingly received discounts from a seller that were not otherwise offered to competing buyers). The complaint against book publishers was dismissed in 1996. *In re Harper & Row Publishers, Inc.*, Interlocutory Order, 122 F.T.C. 113 (1996).

²¹ The Antitrust Division stated:

Robinson-Patman is ineffective when evaluated both in terms of its narrow, protectionist objectives, and in terms of its benefits to the welfare of society as a whole. The greater the business community’s compliance with Robinson-Patman, whether as a result of voluntary action or vigorous public or private enforcement, the greater the Act’s deleterious impact upon competition. However, and this is the anomaly inherent in the law, it cannot be said that an increase in compliance produces a corresponding increase in protection for small business. For, as the preceding analysis shows, Robinson-Patman is largely irrelevant to the survival, success or failure of the small business class in the long run. Rather, the forces of consumer choice and the market remain determinative of success and failure. At the same time the Act has not shown itself to be capable of promoting the antitrust goals of continued competitive vigor and low prices. In fact, the act is regulatory in nature and its enforcement is based on a series of faulty presumptions. The other antitrust laws are capable of protecting against genuine predation, and the ingenuity of those small businessmen who are aggressive and competent will ensure the maintenance of a strong small business sector.

Section of Antitrust Law of the ABA, I *The Robinson-Patman Act: Policy and Law* 40-41 (1983) (quoting U.S. Dept. of Justice, Report on the Robinson-Patman Act (1976)).

²² See note 21 *supra* and accompanying text.

and efficiency. Undoubtedly the lack of government enforcement can be attributed to the understanding that price differences overwhelmingly benefit consumers and that the R-P Act is inconsistent with modern antitrust policy.²³

C. Proposal for Repeal of the Statute

The R-P Act's limited ability to protect small businesses and consumers from price discrimination by sellers is substantially outweighed by the harm to consumer welfare that restricts businesses from lowering prices for procompetitive purposes. The Roundtable urges Congress to repeal the R-P Act in its entirety because it is contrary to sound antitrust policy. At a minimum, the criminal provision of the statute should be repealed to bring the statute in line with current enforcement practices.

IV. Enforcement Institutions

A. Allocation of Enforcement Between States and Federal Agencies

1. Overlapping Merger Enforcement Causes Undue Delay

Today's system of merger review allows for overlapping jurisdiction between the states and federal government, which often results in a more protracted and more burdensome review. Parallel merger proceedings in states and the federal antitrust agencies – or before both federal antitrust and regulatory agencies – often allow the FTC and Antitrust Division to ignore the Hart-Scott-Rodino (“HSR”) statutory timelines by claiming that the HSR deadlines are irrelevant because the parties have not yet received authorization from other state or federal agencies. The lengthening of HSR timelines presents a real problem for businesses awaiting regulatory approval. The Roundtable proposes that the Commission recommend better

²³ See Donald S. Clark, Secretary of the Fed. Trade Comm'n., *The Robinson-Patman Act: Annual Update* (Apr. 12, 1998).

coordination between the antitrust agencies and other state and federal agencies concurrently reviewing a merger to reduce these delays so the HSR deadlines become meaningful.

2. Overlapping State and Federal Jurisdiction

The concurrent jurisdiction between state and federal antitrust agencies to review competition issues creates uncertainty and time delays for the business community that adversely affect the national economy. State antitrust enforcement often “free rides” on federal government investigations, thus subjecting a company to double scrutiny without adding any value for consumers. Rather than allowing this inefficient investigation and enforcement practice to continue, the Roundtable proposes that the Commission recommend that state enforcement actions be focused on conduct that is exclusively intrastate in nature, while federal agencies focus on interstate competition issues.

B. Allocation of Enforcement Between Federal Competition Agencies – Continued Support for Clearance Agreement

A significant problem arises from disputes between the Antitrust Division and the FTC regarding which agency will review a merger or investigate potentially illegal conduct. Far too many disputes lead to delay in the investigation of mergers and civil non-merger matters.

For example:

- the clearance dispute over the investigation into Internet licensing practices in the music industry lasted more than 14 months;
- the dispute over AT&T/Media One lasted two months;
- the dispute over the AOL/Time Warner merger lasted more than 45 days;
- disputes over mergers involving electric utilities and gas pipelines regularly extend for many weeks – Pacific Enterprises/Enova required 5 months to clear, while another electric utility/gas pipeline merger was cleared at 11 a.m. on the final day of the 30-day HSR waiting period; and

- more recently, the agencies have squabbled over who will review the Whirlpool/Maytag transaction, and their dispute over Northrop/United Defense merger consumed 22 days of the 30-day waiting period, resulting in the issuance of a Second Request.²⁴

During these delays, the 30-day HSR waiting period is running without any substantive work on the merger by either the agencies or the parties – or worse, the parties are meeting with staff of both agencies, which in the end is a total waste of time for at least one agency as well as the parties. Often, HSR Second Requests are issued because the clearance dispute has consumed a substantial portion of the 30-day waiting period, or alternatively, the parties are asked to re-file to re-start the waiting period and possibly avoid a second request.

In January 2002, in an effort to eliminate these delays, the agencies announced a proposed clearance agreement intended to curtail such disputes. Despite the positive comments from the business community²⁵ and the noticeable improvements under the agreement, Congress pressured the agencies to rescind the agreement or face severe budget cuts. The agreement was rescinded in May 2002, and as a result, the agencies have fallen back into their old ways and clearance disputes continue.

The clearance process requires an immediate solution. In 2002, the agencies reported that over the prior 28 months, 136 matters were disputed and the average dispute lasted three-and-a-half weeks.²⁶ The Roundtable recommends that the HSR regulations be amended to require clearance within 10 calendar days after an HSR filing, and that a similar standard should

²⁴ Cecile Kohrs Lindell, *Whirlpool-Maytag Moves to the Agencies*, *TheDeal* (Aug. 23, 2005), <http://www.thedeal.com>.

²⁵ The Roundtable supported the clearance agreement. Letter from The Business Roundtable, National Association of Manufacturers, and U.S. Chamber of Commerce to Assistant Attorney General Charles A. James, Antitrust Division of the Department of Justice (Feb. 25, 2002).

²⁶ Federal Trade Commission Statistics, *Clearance Delays*, available at <http://www.ftc.gov/opa/2002/02/clearance/cleardelaystats.htm> (last visited Aug. 19, 2005). Although more recent statistics are not available, Roundtable members believe that comparable problems exist today.

be applied to conduct investigations. As the Roundtable stated in its letter supporting the 2002 agreement, “It is much more important that the FTC and DOJ decide quickly which agency will handle an investigation than which agency will actually conduct the review.”²⁷ The Roundtable supports efforts by the FTC and Antitrust Division to coordinate review and enforcement of competition matters. In addition to implementing a clearance agreement, the Roundtable supports continued monitoring of the clearance process to ensure that the agencies continue to work cooperatively to distribute matters between them.

A clearance agreement would eliminate the squabbling and delays that result from disputes about which agency should review a merger or investigate potentially anticompetitive conduct. Such an agreement would ensure the most efficient utilization of the agencies’ and parties’ time and resources. The allocation of specific industries to each agency would allow the agencies to develop expertise and continually call on prior experience in an industry. A mandatory time limit on the clearance process would ensure that the initial 30-day waiting period is spent assessing competitive issues and determining whether a Second Request is actually necessary. A clearance agreement would shed light on the government processes and demonstrate that the agencies are working efficiently. Finally, a clearance agreement would provide advance notice to the business community and the bar with respect to which agency will handle particular transactions, and this notice might serve to promote a more open dialogue between the agency and the parties even prior to deal announcements. The Roundtable urges that the AMC recommend enactment of a clearance agreement.

V. Exclusionary Conduct

²⁷ Roundtable Letter, *supra* note 25.

The Roundtable believes that additional certainty is required with respect to standards governing exclusionary conduct. We are not urging a wholesale re-write of Section 2 of the Sherman Act, but rather that clarification is needed with respect to the meaning of the Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The problems created by the current uncertainty are illustrated by two recent Court of Appeals decisions.

In *Confederated Tribes v. Weyerhaeuser*, 411 F.3d 1030 (9th Cir. 2005), *petition for cert. pending*, No. 05-381 (U.S. 2005), the Ninth Circuit held that a company can be subjected to treble damages under the Sherman Act based on a jury's finding that the company purchased more inputs "than it needed" or paid more "than necessary" for them. That open-ended inquiry not only is judicially unmanageable, but will deter companies from making efficient purchasing decisions as they seek to adjust to market conditions, all to the ultimate detriment of consumers. Roundtable members have long relied on the Supreme Court's standards for "predatory pricing" claims set forth in *Brooke Group*, which make clear that courts and juries should not engage in such open-ended price regulation. The Ninth Circuit's departure from *Brooke Group* significantly upsets that reliance, threatening stability and predictability in the law that is essential to productive economic enterprise.

The members of The Roundtable include numerous companies that routinely buy inputs and sell outputs. Each of these companies must engage in price negotiations and decisions at each stage of the market process—all with an eye toward maintaining efficiency and engaging in the vigorous competition that benefits consumers. By subjecting companies to an unknowable risk of treble damages from efficient and commonplace purchasing decisions, the Ninth Circuit's decision ultimately deprives consumers of the benefits of market efficiencies. The Ninth Circuit

adopted a dangerous and unworkable rule that subjects purchasing decisions of businesses to judicial oversight as to whether a company purchased more inputs “than it needed” or paid more “than necessary” for them, thereby preventing a competitor from buying at a “fair price.”

Unless the Supreme Court grants the petition for certiorari and clarifies the law, the Ninth Circuit’s holding would deter companies from making efficient purchasing decisions to adjust to rapidly evolving market conditions, thereby fostering inefficiencies that ultimately harm, rather than help, consumers. Because no company could ever predict what a jury, in hindsight, might conclude is a higher price than “necessary” or more inputs than “needed,” or whether prices are “fair,” companies will be deterred from engaging in vigorous purchasing competition and from acquiring critical inputs that may be needed to meet future needs. Courts and juries should not serve as virtually standardless regulators of millions of purchasing decisions that occur every day. Unless the Supreme Court clarifies the law, the Commission should urge that Congress do so.

The recent decision of the Third Circuit in *3M Co. v. LePage’s Inc.*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 2932 (2004), creates considerable uncertainty about the circumstances under which a firm may offer “bundled” pricing and other “above-cost” discounts to its customers. This uncertainty may discourage firms, including Roundtable members, from engaging in discounting activities that benefit consumers. It also complicates internal risk assessment for firms and increases the cost of antitrust counseling.

The Roundtable reiterates the position it expressed in its amicus brief in support of a petition for certiorari in *LePage’s*: above-cost discounted pricing is often procompetitive and benefits consumers. Roundtable members often offer bundled pricing and other discounts, and benefit from bundled discounts offered by their suppliers. Because of the uncertainty

created by the Third Circuit's decision in *LePage's*, Congress should establish a clear standard to re-establish that above-cost price competition is lawful based on the sound precedent in *Brooke Group Ltd.*

Without a bright-line rule in the area of bundled pricing, economic efficiencies and consumer welfare will be jeopardized. Bundling increases economies of scale, is an important mechanism for controlling costs, consolidates costs for advertising and promotion for new products, generates discounts for consumers, and reduces transaction costs between producers and consumers. The decision in *LePage's* is inconsistent with sound antitrust policy because it protects competitors rather than considering effects on competition in the market and consumers. The Commission should urge Congress to clarify the current confusion regarding bundled pricing and articulate the bright-line rule established by the Supreme Court in *Brooke Group* – that above-cost pricing is legal under Section 2 of the Sherman Act even when products are bundled and even when undertaken by dominant firms.

VI. International Issues

A. Coordination with Foreign Antitrust Enforcement Authorities

In 1994, the Roundtable supported enactment of the International Antitrust Enforcement Assistance Act (“IAEAA”), which gave the Antitrust Division authority to share information with antitrust authorities and international antitrust enforcement agencies. The Roundtable believes that international cooperation is necessary in order to assure effective and efficient antitrust enforcement. But appropriate safeguards must protect confidential business information that is produced to U.S. authorities in compliance with U.S. antitrust law. The

Commission should urge the agencies to continue and even expand their efforts to achieve international cooperation and both substantive and procedural convergence.

The IAEAA goes part of the way toward streamlining international antitrust enforcement, but the Roundtable believes more can and should be done to ease the burden on companies seeking to comply with antitrust laws in the U.S. and abroad. The Roundtable supports the current efforts of the Antitrust Division to share information with foreign antitrust authorities under the IAEAA and the efforts that both the FTC and the Antitrust Division are taking to coordinate more effectively with foreign antitrust agencies through the International Competition Network and bilateral arrangements. The Roundtable encourages both the Antitrust Division and the FTC to undertake further efforts to coordinate with international enforcement authorities on both substantive standards and processes in order to give companies greater certainty. Under the current system, many Roundtable members are concerned that they will face conflicting remedies or policies from U.S. and foreign antitrust authorities. Greater harmonization of international antitrust policy will foster stronger business growth that benefits both U.S. consumers and the global economy.

B. Foreign Trade Antitrust Improvements Act

The Roundtable worked actively with Congress to develop and enact the Foreign Trade Antitrust Improvements Act (“FTAIA”), and can therefore knowledgeably address the issues recently considered by the Supreme Court and the D.C. Circuit in *Empagran, S.A. v. F. Hoffman-La Roche Ltd.*, 124 S. Ct. 2359 (2004), *remanded to* 2005 WL 1512951 (D.C. Cir. June 28, 2005). The Roundtable’s Supreme Court amicus brief supported the Court’s decision that the Sherman Act does not apply when “price-fixing conduct significantly and adversely affects both

customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect.” The Roundtable’s amicus brief pointed out that Congress enacted the FTAIA to limit the reach of U.S. antitrust law to claims involving direct effects on U.S. commerce and markets. To read the FTAIA expansively (as some courts did prior to *Empagran*) undermines the authority of international enforcement agencies and also undermines Congress’ intent to limit the application of U.S. antitrust law.

In addition to interfering with and undermining the authority of foreign antitrust agencies to regulate anticompetitive effects on their own markets, interpreting the FTAIA to give broad jurisdiction to U.S. antitrust authorities causes tremendous uncertainty for multinational businesses. The FTAIA was intended to reduce potential conflicts between foreign and U.S. jurisdiction and laws.

The Supreme Court remanded *Empagran* to the D.C. Circuit to consider whether the exception to the domestic injury requirement was established by showing that “but for” an anticompetitive effect in U.S. commerce, there would be no foreign injury. The D.C. Circuit correctly considered that the exception in *Empagran* was very narrow and actually required a finding of proximate cause of the foreign injury, not simply a “but for” cause. *Id.* at 7.

The Roundtable supports this interpretation of the FTAIA, which is consistent with Congressional intent, as demonstrated in Congressional hearings leading up to enactment of FTAIA. It is clear from the statements of FTAIA sponsors that they intended to focus on domestic effects of international business and “allow American firms greater freedom when dealing internationally while reinforcing the fundamental commitment of the United States to a competitive domestic marketplace.”²⁸ The Commission’s report should urge other courts to

²⁸ 127 Cong. Rec. 3538 (Mar. 4, 1981) (statement of Rep. Rodino); *see also* Statement of Sen. Thurmond, Hearings on H.R. 2326 Before the Subcomm. on the Judiciary, 97th Cong. (1981) (“The bill is designed to relieve the antitrust

follow the D.C. Circuit's *Empragran* decision. If other courts diverge from that standard, Congress should intervene and codify it.

VII. Regulated Industries

Competition issues raised by proposed mergers are not exclusively delegated to the FTC and Antitrust Division, but rather are a component of the regulatory authority of various federal agencies, including for example, the FCC, FERC, and the U.S. Department of Transportation. The overlapping authority of multiple federal agencies to review competition issues is the source of conflict, inefficiency, and delay for both the government and private parties. Concurrent oversight of competition issues in regulated industries contributes to a significant time delay and imposes additional costs and burdens on the merging parties. The Roundtable believes that better harmonization and coordination between the agencies would facilitate a more efficient and accurate review of competitive issues.

The Roundtable proposes that the Commission recommend that each regulatory agency exclusively focus on the specialized issues for which the agency was created, and that regulatory agencies not separately consider competition issues. Instead, review of competition issues should be done only by the Antitrust Division and the FTC, which should seek information from the industry-specific agency in analyzing a transaction.

Conclusion

The Roundtable commends the Commission for its study of the antitrust laws and appreciates the opportunity to address policy issues that affect Roundtable members. We urge

concerns of American businessmen over their conduct which primarily affects foreign, rather than domestic markets.”).

the Commission to consider our comments in formulating its report to Congress. We would be happy to respond to any questions posed by the Commission.